Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1203

EVELYN FITZGERALD, BRUCE FITZGERALD, DEBRA GREENER, MICHAEL GREENER, GAIL ATHA, BARBARA STAFFELD, CHARLES STAFFELD, DIANA ARNETT, CHARLES ARNETT, PAULETTE THOMAS, THOMAS THOMAS, HENRY FARAG, DONNA FARAG, SUSAN CHUBBS, BRUCE CHUBBS; and on behalf of all other persons similarly situated,

Petitioners,

VS.

PORTER MEMORIAL HOSPITAL; ARTHUR S. MALASTO, in his capacity as Administrator of Porter Memorial Hospital; and MAURICE MASON, JAMES W. CHESTER, WARREN H. CANRIGHT, and JAMES J. CRANDALL, individually and in their capacities as members of the Board of Trustees of Porter Memorial Hospital.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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No.

EVELYN FITZGERALD, BRUCE FITZGERALD, DEBRA GREENER, MICHAEL GREENER, GAIL ATHA, BARBARA STAFFELD, CHARLES STAFFELD, DIANA ARNETT, CHARLES ARNETT, PAULETTE THOMAS, THOMAS THOMAS, HENRY FARAG, DONNA FARAG, SUSAN CHUBBS, BRUCE CHUBBS; and on behalf of all other persons similarly situated,

Petitioners,

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PORTER MEMORIAL HOSPITAL; ARTHUR S. MALASTO, in his capacity as Administrator of Porter Memorial Hospital; and MAURICE MASON, JAMES W. CHESTER, WARREN H. CANRIGHT, and JAMES J. CRANDALL, individually and in their capacities as members of the Board of Trustees of Porter Memorial Hospital,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Evelyn Fitzgerald, Bruce Fitzgerald, Debra Greener, Michael Greener, Gail Atha, Barbara Staffeld, Charles Staffeld, Diana Arnett, Charles Arnett, Paulette Thomas, Thomas Thomas, Donna Farag, Henry Farag, Susan Chubbs, Bruce Chubbs, individually and on behalf of all other persons similarly situated, respectfully pray that this Court issue a Writ of Certiorari to review and reverse the judgment of the United States Court of Appeals for the Seventh Circuit in Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716 (7th Cir. 1975), entered on September 26, 1975, affirming the decision of the United States District Court for the Northern District of Indiana (Hammond Division) in Fitzgerald v. Porter Memorial Hospital, No. 74-204 H (September 10, 1974).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (hereinafter Seventh Circuit) was reported at 523 F.2d 716 (7th Cir. 1975) and may be found at pages A-1 through A-13 of the Appendix. An order denying petitioners' petition for rehearing and suggestion for en banc determination was entered on November 21, 1975. This order may be found at page A-14 of the Appendix. The opinion of the District Court may be found at pages A-15 through A-17 of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 19(1)(b) to review a decision of the Seventh Circuit which decided an important question of federal law which has not been, but should be, settled by this Court and to exercise its supervisory powers over lower federal courts.

QUESTION PRESENTED FOR REVIEW

The petitioners present the following question for review by this Court: Whether the Seventh Circuit erred in deciding a constitutional issue of first impression and of grave importance without the benefit of an evidentiary hearing.

CONSTITUTIONAL PROVISIONS INVOLVED

On the merits, this action touches on questions involving the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. However, the limited question presented for review is essentially one of procedure rather than substance.

STATEMENT OF THE CASE

A. Nature of the Case

This is an action brought pursuant to 42 U.S.C. §1983 by pregnant women and

their husbands seeking injunctive relief and damages for violation of rights secured to them by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution. Jurisdiction is based on 28 U.S.C. §1343(3) and (4). Petitioners challenge the policy of defendant Porter Memorial Hospital that prohibits the presence of any non-medical person in the delivery room during the birth of a child. Other defendants are the administrator of the hospital and the members of the hospital board of trustees.

B. Statement of the Facts

Petitioners are pregnant women and their husbands who have taken a comprehensive course of study in and have practiced various techniques and exercises which are a requisite part of the LaMaze Psycho-prophylactic Method of childbirth.

This method requires a serious commitment on the part of those participating. Both husbands and wives must attend a series of classes that include lectures, films, question and answer periods, instruction in controlled breathing and relaxation techniques, and discussions on pregnancy and childbirth related topics. This advanced instruction and training serve to prepare the couples for the events that occur during pregnancy, labor, and delivery and enable them to function as a team during labor and delivery, with the husband supplying physical and emotional support to his wife.

Petitioners are prepared to offer evidence to prove their contentions, 1) that the presence of the husbands in the hospital delivery room is a well-accepted medical practice; 2) that the psycho-prophylactic (or prepared) childbirth methods with the lack of or lesser amounts of anaesthesia are safe and desirable for both mother and baby.

Accordingly, petitioners attempted to have the husbands present for the deliveries of their children but were denied this opportunity by defendant hospital's policy prohibiting the presence in the delivery room of any non-medical personnel.

C. Proceedings Below

On August 9, 1974, petitioners filed their complaint and motion for a temporary restraining order in the United States District Court for the Northern District of Indiana, Hammond Division. A hearing on the motion for a temporary restraining order was held on August 20, 1974.

At this hearing defendants filed a motion to dismiss the complaint and to dismiss the petition for a temporary restraining order.

On September 10, 1974, District Court Judge Allen Sharp entered an order dismissing the complaint accompanied by a memorandum opinion in which he concluded that the petitioners lacked standing to sue.

Petitioners filed a notice of appeal to the Seventh Circuit Court of Appeals on October 9, 1974. Oral argument was heard on April 14, 1975. On September 26, 1975, the Seventh Circuit affirmed the lower court's dismissal of the action in an opinion by Judge (now Justice) Stevens which dealt with the merits of the case.

On October 10, 1975, petitioners filed a petition for rehearing and suggestion for en banc determination. This petition was denied by the Seventh Circuit in an order entered on November 21, 1975.

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit has decided a constitutional issue of first impression and grave importance without the benefit of either an evidentiary hearing or a full record. The constitutional issues involved in this case had not been considered by the lower court which dismissed the case for lack of standing. The dismissal, just two weeks after the action was filed, has deprived the petitioners of the opportunity to present relevant and necessary evidence for a proper determination of the merits.

It is a well-settled principle that a court of appeals will not consider on appeal the merits of an issue on which the district court has not ruled. Hormel v. Helvering, 312 U.S. 552 (1941). Reviewing a decision of the Board of

Tax Appeals, this Court discussed the correctness of an appellant court's deciding issues not raised in the lower court stating:

> Ordinarily an appellate court does not give consideration to issues not raised below. For our procedural scheme contemplates that parties shall come to issue in the trial forum vested with authority to determine questions of fact. This is essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence.

Id. at 556 (emphasis added). The Court went on to state that the rules of practice and procedure are devised to promote the ends of justice, not to defeat them. Id. at 557. In essence, this general rule has been established to allow the litigants an opportunity to present the issues at the trial level accompanied by appropriate evidence.

The scope of review problem generally arises in cases where an issue is

presented for the first time on appeal, even though there has been a trial in the lower court on other issues. Such was the situation in Hormel and the principle set forth has been subsequently followed in several circuits. Equal Employment Opportunity Commission v. Standard Forge and Axle Company, Inc., 496 F.2d 1392 (5th Cir. 1974); K-2 Ski Company v. Head Ski Company, 506 F.2d 471 (9th Cir. 1974) Eureka-Carlisle Company v. Rottman, 398 F.2d 1015 (9th Cir. 1968). In Eureka, the court stated,

> ordinarily an appellate court will not consider a question of law or fact which was not presented to, considered, or decided by the trial court.

Id. at 1010. In addition, courts have held that a court of appeals does not sit as a fact finder, Thomas v. Shaw, 497 F.2d 123 (5th Cir. 1974); and that a court of appeals does not sit to render advisory opinions or decisions on abstract legal propositions, Swann v. Charlotte-Mecklenburg Board of Education, 489 F.2d 966 (4th Cir. 1974).

Despite the fact that these cases represent situations in which a trial was held, the rationale for not considering a new issue on appeal is equally applicable to situations where a trial has not yet been held, as in the present case. A court of appeals should not consider an issue that has not been presented to a trial court, for whatever

reason, because it deprives the parties of the opportunity to present relevant evidence that could have a profound impact on the outcome.

In Borden's Farm Products Company v. Baldwin, 293 U.S. 194 (1934), on an appeal from a three-judge district court which dismissed, on a motion equivalent to a demurrer, a bill brought to enjoin enforcement of a provision of the New York Agriculture and Markets Law, this Court remanded the case for a trial on the merits. In declining to decide the underlying substantive issues, this court stated:

> The factual basis of this contention is disputed and there are no findings disclosing it. . . . For the present purpose, it is sufficient to say that these arguments . . . lie outside the range of judicial notice . . . . But the case is not before us upon evidence, or upon determination of fact based on evidence, as the complaint was dismissed solely in the view that it failed to state a cause of action and the motion for injunction accordingly fell without findings being made . . . . the decision of this appeal should not turn on other facts which are the proper subjects of evidence

> and of determinations of fact by the trial court.

Id. at 208 (emphasis added). Considering the circumstances of the Borden case in light of the then recent expansion of governmental regulation and the consequent increase in allegations of constitutional violations, this Court referred to a prior decision, Hammond v. Schappi Bus Line, 275 U.S. 164, 170-72 (1927), and stated:

> We held that before the questions of constitutional law, both novel and far-reaching importance, were passed upon by this court, "the facts essential to their decision should be definitely found by the lower courts upon adequate evidence."

293 U.S. at 210. The concurring opinion of Justices Stone and Cardozo stated the same principle in a similar manner:

> We are in accord with the view that it is inexpedient to determine grave constitutional questions upon a demurrer to a complaint, or upon equivalent motion, if there is a reasonable likelihood that the production of evidence will make the answer to the question clearer.

293 U.S. at 123.

The principles set forth in Borden are directly applicable to the case at bar. A dismissal before a trial on the merits in this instance prevents the introduction of evidence on novel and important constitutional questions. The decision by the court of appeals on the constitutional merits was made without the benefit of the identification and clarification of the issues by the trial court. Petitioners in this case have been denied the opportunity to present important evidence that is essential to support the allegations of constitutional violations set forth in the complaint. These plaintiffs are prepared to offer and indeed, are entitled to present such evidence.[1] Judge Sprecher referred to

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[1]Plaintiffs are prepared to offer evidence concerning: (1) the extent to which the psychoprophylactic method of childbirth is an accepted and commonly practiced medical procedure; (2) the alternative precautions against infection or invasion of privacy that might easily be employed by the Hospital short of a complete ban on fathers in the delivery room; (3) the uniqueness of psychoprophylactic childbirth techniques when compared with other more traditional medical procedures; (4) the efficacy of the hospital's claims of lack of changing facilities and unavoidable privacy invasions in the hospital corridors when seen in light of the physical plant; (5) the acceptance of the LaMaze technique by physicians practicing at Porter Memorial Hospital itself; (6) in Judge Sprecher's

the impropriety of the Seventh Circuit's decision on the merits when he stated that the majority "has bowed to the expertise of the medical profession without the benefit of an evidentiary hearing" on the basis of a state interest that "is so noncompelling as to be virtually nonexistent." Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 722, 724 (7th Cir. 1975) (Sprecher, dissenting). In the case at bar, there exists a genuine dispute as to the underlying facts which must first be settled by the trial court before a proper determination of the constitutional issues can be made. The Eighth Circuit Court of Appeals, in a suit by an environmental organization and individuals to enjoin a development project until an impact statement had been filed, refused to consider the merits when the appeal was from a motion to dismiss for lack of standing. Coalition for the Environment v. Volpe, 504 F.2d 156 (8th Cir. 1974). The Volpe court held that the only issue presented to the reviewing court for determination was that of standing. Because of the trial court's decision on the standing issue, it simply did not reach any of the other issues and therefore, it is not proper for the reviewing court to decide issues not treated by the trial court. Id.

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words, "the magnitude of the importance of the presence of the expectant father." Fitzgerald v. Porter Memorial Hospital, 523 F.2d 716, 724 (7th Cir. 1975) (Sprecher, J., dissenting).

> We treat arguments concerning the substantive allegations only as they relate to the question of standing and do not reach the issues: . . . These questions are best dealt with in the first instance by the trial court.

Id. at 162. The situation in Volpe is identical to the present case. Because of the adverse ruling on the standing issue, petitioners were not allowed to present their case. Upon review, the only question that should have been considered by the Seventh Circuit was that of standing.[2] Once the court had determined that standing did exist, the case should have been remanded, as in Volpe, to the district court for a trial on the merits.

---

[2]The only issue plaintiffs raised on the appeal to the Seventh Circuit was that of standing. (See p. 1 of Brief of Appellants filed in the Seventh Circuit.) Plaintiffs' brief dealt with the merits of the constitutional question only to the extent that it was necessary to establish that the rights asserted were arguably within the zone of interests protected to satisfy the standing requirements as set forth in Association of Data Processing Service Organization v. Camp, 397 U.S. 150 (1970).

Cases dealing with interlocutory appeals present the same basic issue. The general rule is that where an interlocutory appeal is taken, the appellate court will not go any further into the merits of the case than is necessary to decide the matter upon appeal. 9 Moore's Federal Procedure, §110.25 1 (2d ed. 1972). This Court has held that upon an interlocutory order, "[i]t was not intended that the cause as a whole should be transferred to the appellant court." Ex Parte National Enameling and Stamping Company, 301 U.S. 156 (1906). The Eighth Circuit has held that upon an interlocutory appeal it is improper to consider grave constitutional questions where there exists reasonable likelihood that further proceedings could help clarify the issues. Board of Managers of Arkansas Training School for Boys v. George, 377 F.2d 228, 231 (8th Cir. 1967). The policy arguments that an appellant court should not decide issues that have not been presented to a trial court are equally applicable whether there has been a trial on other issues or whether there has been no trial at all. Where the introduction of evidence would be helpful to clarify the issues, the appellate court should not decide the merits without the benefit of a record below.

The general rule in both instances is not without exception. This Court has held that where the point is so clear that nothing would be gained by remanding the issue even though the opinion does not decide it, effective

judicial administration requires that the matter be disposed of on appeal. Levin v. Mississippi River Fuel Corporation, 386 U.S. 162 (1966). Where no issue remains to be solved, and it is clear under prior decisions and the undisputed facts of the case what the outcome will be, there is no reason not to dispose of the case. Turner v. City of Memphis, 369 U.S. 350, 353 (1961). Petitioners do not argue against expeditious disposition of cases when it is consistent with proper judicial administration. Petitioners do contend, however, that the current case simply does not fit this exception. This is a case of first impression and grave constitutional importance. It would be a serious mistake for the appellate court to decide the merits of the constitutional questions without the benefit of a hearing -- especially when a balancing of competing interests is necessary. The constitutional issue in the case at bar is not clear; it has not been resolved by prior decisions; and essential to its proper determination is a resolution of the dispute as to the underlying facts by a trial court. For these reasons, the Levin - Turner exception does not apply to the present case. Referring to the exception, the Second Circuit stated, "[s]uch an exception serves the obvious interest of economy of litigation, . . . [but] it is the rare case that contains no triable issue of fact." Hurwitz v. Directors Guild of American Incorporate, 364 F.2d 67, 70 (2d Cir. 1966) cert. denied, 385 U.S. 971 (1966). The present case is not such a rare

situation.

Finally, this Court has before it now a case, Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1975) cert. granted, 95 S.Ct. 2655 (1975), which, although it includes a three-judge court question, expressly presents the question, "Whether the Court of Appeals acted in excess of its jurisdiction when it proceeded to determine on the merits the constitutionality of [a Missouri statute]." 95 S.Ct. at 2655. In Wulff, the Eighth Circuit Court of Appeals overruled the three-judge district court's dismissal for lack of standing, and then proceeded to decide the constitutional issues. Referring to the appropriateness of deciding the substantive questions, the court stated that, "[this question is not without its difficulty. There is little direct authority for the propriety of our reaching the merits." 508 F.2d at 1214. Proceeding to the merits, the court relied primarily on the policy arguments of judicial economy and the proposition that a court of appeals has the power "to do what plainly ought to be done." Mercury Motor Express, Inc. v. Brinke, 475 F.2d 1086, 1091 (5th Cir. 1973). The Wulff court held that the statute in question was obviously unconstitutional, therefore not requiring a determination by a three-judge court.[3]

[3]What was so obvious to the Eighth Circuit Court of Appeals, raised considerable doubt in the Sixth Circuit when the identical issue was presented. Roe v. Ferguson, 515 F.2d 279 (6th Cir. 1975). In Roe v. Ferguson, a statute similar to the one held invalid in Wulff was challenged. The district court found that the Ohio statute was in conflict with the Social Security Act and, therefore, invalid. Reversing the lower court's holding, the Sixth Circuit Court of appeals remanded the case for a convening of a three-judge court to determine the constitutional issues. The court stated,

> [W]e find ourselves, therefore, in disagreement with the Eighth Circuit's ruling in Wulff v. Singleton [citation omitted], that the unconstitutionality of this type of statute is so "obvious and patent" as to obviate the need for a three-judge court.

Id. at 284. The fact that these two circuits disagree on the clearness of the constitutional issue suggests the inherent danger of expanding the circuit courts' jurisdiction over issues that have not yet been presented at the trial level where classification of the question within the particular context would assist their proper determination. This disagreement points out the need for an evidentiary hearing.

By granting certiorari, this Court now has the opportunity to decide whether or not the Court of Appeals exceeded its jurisdiction by ruling on the merits.

Essentially the same issue is presented in the case at bar, with the exception that the three-judge court provision is not involved. The general rule that appellate courts will not consider issues not presented to the lower courts is applicable because: 1) the case presents a grave constitutional question of first impression; and 2) there exists a genuine dispute as to the material facts. It would be unfair to the parties involved to deprive them of an opportunity to present evidence in support of their claims. Petitioners seek to have the Seventh Circuit Court of Appeals decision on the merits of the constitutional claims reversed and remanded to the district court for an evidentiary hearing.

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should be issued to review the judgment and order of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1949

EVELYN FITZGERALD, BRUCE FITZGERALD, DEBRA GREENER, MICHAEL GREENER, GAIL ATHA, KAREN SCOTT, GEOFFREY SCOTT, BARBARA STAFFELD, CHARLES STAFFELD, DIANA ARNETT, CHARLES ARNETT, PAULETTE THOMAS, THOMAS THOMAS, HENRY FARAG, DONNA FARAG, ELEANOR KIRKLAND, ALFRED KIRKLAND, SUSAN CHUBBS, BRUCE CHUBBS; and on behalf of all other persons similarly situated,

Plaintiffs-Appellants

vs.

PORTER MEMORIAL HOSPITAL; ARTHUR S. MALASTO, Administrator of Porter Memorial Hospital; BOARD OF TRUSTEES OF PORTER MEMORIAL HOSPITAL; MAURICE MASON; JAMES W. CHESTER; WARREN H. CANRIGHT; JAMES J. CRANDALL, individually and in their capacities as members of the Board.

Defendants-Appellees

On Appeal from the United States District Court for the Northern District of Indiana (Hammond Division)
No. 74-204 H
ALLEN SHARP, *Judge.*

ARGUED APRIL 14, 1975 — DECIDED SEPTEMBER 26, 1975

Before CASTLE, *Senior Circuit Judge,* STEVENS and SPRECHER, *Circuit Judges.*

STEVENS, *Circuit Judge.* This appeal presents the question whether a mother, her husband, or their doctor has a

constitutional right to have the father present during the birth of a child.

Porter Memorial Hospital, a public hospital, maintains and enforces a policy "prohibiting the presence of any person or persons in the Delivery Rooms located in the Obstetrics Ward other than members of the Medical Staff and Nursing Staff."[1] Plaintiffs are married couples who have completed training courses in the psychoprophylactic or LaMaze method of childbirth.[2] At the time of the filing of the complaint herein, each couple but one was either expecting the birth of a child or had recently given birth at Porter Memorial Hospital.[3] In each case, the Hospital had either indicated that, pursuant to the above-quoted policy, it would not permit the husband to be present in the delivery room or actually prevented the husband from participating in the delivery. Plaintiffs brought suit against the Hospital, the members of the board of directors and the Hospital administrator under 42 U.S.C. § 1983[4] and the First, Fourth, Ninth, and Fourteenth Amendments to the Constitution,[5] on behalf of themselves and other similarly-situated persons, challenging the constitutionality of the Hospital's policy and seeking injunctive and declaratory relief and damages.

[1] Affidavit of Administrator Arthur S. Malasto, *see* n. 6, *infra*.

[2] As plaintiffs explained in their brief to this court,

> "This method requires a serious commitment on the part of those participating. Husbands and wives must attend a series of classes that include lectures, films, question and answer periods, instruction in controlled breathing and relaxation techniques; and discussions on various pregnancy-related topics. This advance preparation and training serve to prepare the couples for the events that take place during pregnancy, labor and delivery, and enable them to function as a team during labor and delivery, with the husband supplying physical and emotional support to his wife."

[3] Although all of the plaintiffs have had their children, the case is not moot. In *Roe* v. *Wade*, 410 U.S. 113, 125, the Supreme Court indicated that, because of its brief time span, "Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be 'capable of repetition yet evading review.'"

[4] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Jurisdiction was claimed under 28 U.S.C. § 1343(3). There is no dispute that Porter Memorial Hospital is a public hospital and that its actions are "under color of state law" within the meaning of § 1983.

[5] The Complaint stated as an alternative basis of jurisdiction 28 U.S.C. § 1331. The requisite amount in controversy was alleged.

The district court held a hearing on plaintiffs' application for a temporary restraining order at which the plaintiffs introduced the testimony of one physician and the affidavits and letters of others explaining the LaMaze birth method and its benefits for both mother and child. Defendants countered with the affidavit of defendant Malasto, Hospital Administrator, wherein he explained that the Hospital had recently considered, but rejected, a change in the exclusionary policy and set forth reasons for continuing the rule.[6] Motions to dismiss both the complaint for failure to state a claim and the petition for a temporary restraining order were filed.

On September 10, 1974, the district court, in an unreported memorandum opinion and order granted the motion to dismiss.[7] No ruling was rendered on the request

[6] Malasto stated:

> "That among the rules and regulations of Porter Memorial Hospital is one prohibiting the presence of any person or persons in the Delivery Rooms located in the Obstetrics Ward other than members of the Medical Staff and Nursing Staff. That on June 25, 1974, the Medical Staff considered the adoption of a recommendation to the Board of Trustees to change the foregoing prohibition by allowing the attendance of the spouses in the rooms where their wives were giving birth. This recommendation was rejected by the Medical Staff in its meeting on said date.
>
> "The Board of Trustees, in its meeting held on July 9, 1974, resolved to continue the policy of not permitting fathers in the delivery room at any time.
>
> "That the Obstetrics Ward in Porter Memorial Hospital contains labor rooms, recovering room, nurses' station and obstetrics lounge in addition to the delivery rooms. That ingress and egress to the various rooms is afforded by corridors. That there is a common corridor serving the three (3) Delivery Rooms. That there are no private entrances to any of the three (3) Delivery Rooms except through the aforementioned corridor. That expectant mothers are removed from labor rooms to the said delivery rooms when birth is imminent. That these patients are open to view to persons using the corridor serving the said three (3) delivery rooms. That the said corridor is off-limits to all persons other than attending physicians and members of the Nursing Staff and obstetrics patients.
>
> "A diagram showing the corridor and its adjoining rooms is attached hereto and made a part hereof and labeled Exhibit 1.
>
> "That there are presently no facilities in the Obstetrics Ward for changing rooms for any of the persons except members of the medical Staff and Nursing Staff.

[7] The Court found that it had jurisdiction under 28 U.S.C. § 1343(3). There was no discussion of whether the Hospital is a "municipal corporation" within the meaning of *Monroe* v. *Pape*, 365 U.S. 167, and

for certification of the suit as a class action. The court found that the Hospital was not denying the plaintiffs access to its facilities or totally prohibiting a medically approved operation and that plaintiffs did not have standing to assert the rights of their physicians. From this order plaintiffs appeal.[8]

I.

Plaintiffs characterize the right they assert as an aspect of the "right of marital privacy." The source of its constitutional protection is either the so-called penumbra of various provisions of the Bill of Rights[9] or the word "liberty" in the Due Process Clause of the Fourteenth Amendment.[10]

It is somewhat unfortunate that claims of this kind tend to be classified as assertions of a right to privacy. For

[7] (Continued)
City of Kenosha v. *Bruno*, 412 U.S. 507, and, thus, immune to suit under § 1983. Clearly the individual defendants could be sued under that provision, however, and it appears the action could be maintained against the Hospital directly under the Fourteenth Amendment, via 28 U.S.C. § 1331. *See Calvin* v. *Conlisk*, No. 74-1289, at 11 (7th Cir., June 30, 1975); *Hopstrop* v. *Bd. of Junior College District No. 515*, No. 74-1915, at .... (7th Cir., Sept. ...., 1975).

[8] Defendants argue initially that the district court order must be affirmed because plaintiffs have failed to allege an essential precondition to the right they seek to assert, "the right to have fathers present at the birth of their children if said Plaintiffs have the consent of the attending physician." (Complaint, para. X.5). As defendants point out, nowhere in the complaint do plaintiffs specifically allege that their physicians had, or would have, consented but for the policy of the Hospital, to the presence of the fathers in the delivery room. Thus, they argue that it would be inappropriate for us to reach the constitutional question presented herein.

We think a fair reading of the complaint indicates, however, that it is the policy of Porter Memorial Hospital and not any hesitancy on the part of plaintiffs' doctors which has prevented the husbands from being present in the delivery room. In subparagraphs 18(c) and (d) it is alleged that plaintiffs Bruce Fitzgerald and Michael Greener were so excluded from the delivery room at the time of the birth of their children. Moreover, in subparagraph 18(e), plaintiffs allege that the Obstetrical Committee of the Hospital had voted to permit plaintiff Geoffrey Scott to be present in the delivery room during the birth of his child. While this recommendation was later rejected by the Hospital staff and Board of Trustees, it is clear that there were qualified obstetricians who would have delivered the Scott baby at Porter Memorial in the father's presence. Thus, we conclude that the constitutionality of the Hospital's policy is squarely presented by this case and is ripe for resolution at this time.

[9] See Griswold v. Connecticut, 381 U.S. 479, 484.

[10] See Roe v. Wade, 410 U.S. 113, 153.

the group of cases that lend support to plaintiffs' position do not rest on the same privacy concept that Brandeis and Warren identified in their article in the 1890 Edition of the Harvard Law Review.[11] These cases do not deal with the individual's interest in protection from unwarranted public attention, comment, or exploitation. They deal, rather, with the individual's right to make certain unusually important decisions that will affect his own, or his family's, destiny. The Court has referred to such decisions as implicating "basic values,"[12] as being "fundamental,"[13] and as being dignified by history and tradition.[14] The character of the Court's language in these cases brings to mind the origins of the American heritage of freedom — the abiding interest in individual liberty that makes certain state intrusions on the citizen's right to decide how he will live his own life intolerable.[15] Guided

[11] Warren & Brandeis, "The Right to Privacy", 4 Harv. L. Rev. 193 (1890).

[12] "In my view, the proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty,' *Palko* v. *Connecticut*, 302 U.S. 319, 325." *Griswold* v. *Connecticut*, 381 U.S. 479, 500 (Harlan, J., concurring).

[13] "These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty' *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy." *Roe* v. *Wade*, 410 U.S. 113, 152.
"The language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments." *Griswold* v. *Connecticut*, 381 U.S. 479, 488 (Goldberg, J., concurring).

[14] "We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system." *Griswold* v. *Connecticut*, 381 U.S. 479, 486.
"Judicial self-restraint will not, I suggest, be brought about in the 'due process' area by the historically unfounded incorporation formula advanced by my Brother BLACK, and now in part espoused by my Brother STEWART. It will be achieved in this area, as in other constitutional areas, only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms." 381 U.S. 479, 501 (Harlan, J., concurring).

[15] "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Eisenstadt* v. *Baird*, 405 U.S. 438, 453.

by history, our tradition of respect for the dignity of individual choice in matters of conscience and the restraints implicit in the federal system, federal judges have accepted the responsibility for recognition and protection of these rights in appropriate cases. But can it fairly be said that this is such a case?

As we understand plaintiffs' argument, there are three aspects of their asserted right that make it worthy of constitutional protection. It arises out of the marital relationship; the birth of a child is an extremely important event; in their judgment, and in the judgment of a respectable segment of the medical profession, the LaMaze procedure is safe and, indeed, a more beneficial obstetrical procedure than traditional practices which deny the father the right to be present when the delivery takes place in a hospital. Neither individually nor collectively do these facts justify judicial review of the rule which has been adopted by the professional staff of the defendant hospital.

Although plaintiffs' claim is advanced only in the name of "marital privacy," we are persuaded that, if valid, it could be asserted with equal force by unwed parents and perhaps also by other persons about to undergo serious medical procedures.[16] Respect for the private aspects of the institution of marriage were heavily emphasized in Justice Douglas' opinion for the Court in *Griswold* v. *Connecticut*, 381 U.S. 479. But neither the conception that produced *Griswold*, nor its progeny, is narrowly limited to marital rights. For Justice Douglas drew support for the Court's holdings from its earlier recognition of the parents' right to educate their children in schools of their choice,[17] the right to study the German language,[18] and the right to select one's associates.[19] And the *Griswold* holding

[16] If the right plaintiffs assert does exist, surely it is not confined to the husband and wife. An unwed mother may have the same need for emotional support, and the same interest in a superior medical procedure, as a wife. Indeed, any patient about to undergo serious surgery might also assert a constitutionally protected interest in the companionship of his choice during the time of stress, or, indeed, in the surgical procedure of his choice. Plaintiffs make no such expansive claim, but a fair analysis of their position requires concern about the consequences of adopting the rule they espouse.

[17] *Pierce* v. *Society of Sisters*, 268 U.S. 510.

[18] *Meyer* v. *Nebraska*, 262 U.S. 390.

[19] *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 462.

that husband and wife may decide whether or not to use contraceptives has subsequently been extended to accord a comparable right to unmarried individuals.[20] Finally, the constitutional protection given to the pregnant woman's right to decide whether or not to bear her child is clearly not dependent on respect for the institution of marriage; it respects the individual's interest in a decision which, by any standard, is certainly of fundamental importance and implicates basic values.

Plaintiffs ask us to hold that their decision to use the LaMaze method of child birth is entitled to equal respect and may not be frustrated by a public hospital's rule.

The birth of a child is an event of unequalled importance in the lives of most married couples. But deciding the question whether the child shall be born is of a different magnitude from deciding where, by whom, and by what method he or she shall be delivered. In its medical aspects, the obstetrical procedure is comparable to other serious hospital procedures. We are not persuaded that the married partners' special interest in their child gives them any greater right to determine the procedure to be followed at birth than that possessed by other individuals in need of extraordinary medical assistance.

Plaintiffs do not contend that they have a right to have the husband present without the consent of the attending physician. Implicitly, therefore, they acknowledge that their asserted right is subordinate to the dictates of sound medical practice. Having implicitly admitted that individual doctors may find valid medical reasons for excluding the father in individual cases, they must equally recognize that hospitals may also assume that the number of cases in which exclusion is appropriate is sufficiently large to justify the development of facilities and procedures in which the presence of the husband would be objectionable.[21] More importantly, the valid medical reasons for exclusion in individual cases requires us equally to recognize that the dispute within the medical profession as to

[20] *Eisenstadt* v. *Baird*, 405 U.S. 438.

[21] Administrator Malasto's affidavit states that permitting fathers to be present in the delivery room would, given the physical set-up at the hospital, result in a loss of privacy for other patients about to give birth.

the propriety and safety of permitting the husband to be present during the routine birth[22] is not one that should be resolved by substituting our judgment for the professional judgment of the staff of defendant hospital.

We hold that the so-called right of marital privacy does not include the right of either spouse to have the husband present in the delivery room of a public hospital which, for medical reasons, has adopted a rule requiring his exclusion.

II.

Plaintiffs also argue that the hospital rule improperly restricts the rights of their physicians to practice medicine.[23] They rely on *Doe* v. *Bolton*, 410 U.S. 179, and other

[22] *Compare* J. Morton, "Fathers in the Delivery Room — an Opposition Standpoint," Hospital Topics 103 (Jan. 1966); S. Olds & L. Witt, "New Man in the Delivery Room — the Father," Today's Health 52 (Oct. 1970); N. Sehgal, "The Potential for Problems when Husbands are in the Delivery Room," Resident and Staff Physician 33 (March, 1973); C. Shu, Husband-Father in Delivery Room," Hospitals, J.A.H.A. 90 (Sept. 17, 1973), *with e.g.*, Int'l Childbirth Education Association, "Husbands in the Delivery Room" (1971)

It appears that all parties are in accord that medical reasons were raised by the Hospital in refusing to change its policy. As plaintiffs themselves informed the district court in their Brief in Support of Plaintiffs' Motion for Temporary Restraining Order, at 4, testimony at trial would show that:

> "By public statement the Hospital put forth three reasons for its policy excluding fathers from the delivery room, to-wit: (1) the increased danger of infection and/or sepsis from the introduction of a non-medical person (2) the increased danger of disruption and interference with delivery room routine by a non-medical person and (3) there is no place for fathers to change from streetclothes into delivery room uniform."

Since it is the existence of a bona fide medical dispute, rather than the appropriate resolution of that dispute, which concerns us, no purpose would be served by remanding the case to the district court for a hearing.

[23] The district court did not reach this contention, for it was found that the plaintiffs did not possess the requisite standing to assert the right of the absent doctors. The district court relied on the fact that any doctor could assert his rights to practice without restriction, citing *Barrows* v. *Jackson*, 346 U.S. 249. Recent decisions of the Court suggest, however, that whenever one party to a confidential professional relationship asserts injury to himself and to the rights of the other party to such a relationship, he may assert the rights of the absent partner. As the Court explained in *Griswold* v. *Connecticut*, 381 U.S. 479, 481,

> "The rights of husband and wife, pressed here, are likely to be diluted or adversely affected unless those rights are considered in a suit involving those who have this kind of confidential relation to them."

cases invalidating hospital rules which placed greater restrictions on the performance of abortions than on comparable medical procedures. Those rules impaired the exercise of a right which the Court had held entitled to constitutional protection. We have rejected the claim that the right asserted by plaintiffs in this case is entitled to such protection, and there is no claim that the hospital's exclusionary rule discriminates against obstetrical procedures as opposed to other operations. The argument advanced by plaintiffs when standing in their doctors' shoes is no stronger than their own. We are moved, but not persuaded, by their own interest in companionship and moral support; we are unmoved, and certainly unpersuaded, by the argument that the rule is an unconstitutional impairment of the doctors' right to practice medicine free of unreasonable governmental restraint. Since, as we have already noted, there is a difference of opinion within the profession as to the desirability of such a rule, this is a classic example of the kind of situation in which individual hospitals should be permitted to make individual choices, rather than having an inflexible rule imposed upon all hospitals in the nation by federal judicial decision.

AFFIRMED.

SPRECHER, *Circuit Judge*, dissenting. Although I concur in Judge Stevens' disposition of the jurisdictional, mootness and standing issues and I have no quarrel with his general discussion of the right to privacy, I dissent completely from his conclusion that the right to privacy does not include the right of expectant parents to have the male present with the female in the delivery room of a public hospital in cases where the attending physician has consented to that procedure.

---

[23] (Continued)

Cf. Eisenstadt v. *Baird*, 405 U.S. 438, 443-446; *Friendship Medical Center, Ltd.* v. *Chicago Board of Health*, *supra* n. 11, at 1145-1148. *See generally* R. Sedler, "Standing to Assert Constitutional Jus Tertii in the Supreme Court," 71 Yale L.J. 599 (1962);; Comment, "Standing to Assert Constitutional Jus Tertii," 88 Harv. L. Rev. 423 (1974).

We need not decide whether the district court erred in this respect, for we are convinced that, even if they do have standing to raise the claims of their doctors, the adoption of this policy has not violated these rights.

Although the plaintiffs pray on appeal "that this court should reverse on the standing issue and remand the case to the district court for a trial on the merits," Judge Stevens has bowed to the expertise of the medical profession without the benefit of an evidentiary hearing. Nevertheless, the record before us includes uncontradicted evidence that under the LaMaze method of childbirth "in the more than 45,000 cases collected in . . . surveys, there was not one infection traceable to the practice and not one malpractice suit."

The plaintiffs also submitted the affidavit of a Clinical Professor of Obstetrics and Gynecology at the University of Chicago School of Medicine who stated that he has delivered approximately one thousand babies in the past four years with the fathers present in the delivery room and it is his opinion:

> [1] That . . . the presence of the father during the delivery of the infant is beneficial to the mother, the father, the infant and himself;
>
> [2] That the father's presence in the delivery room has an extremely stabilizing effect on the mother, thereby aiding her in the second stage of labor (delivery);
>
> [3] That the mother's cooperation during the second stage of labor helps to enable her to deliver the baby sooner and more safely because she will be calmer, and thus able to bear down more intensively, thus shortening this stage of labor;
>
> [4] That because of this shortened labor, the newborn will have increased probability of a healthy birth and a decreased probability of hypoxia (insufficient oxygen);
>
> [5] That the father's presence in the delivery room does not create a need for additional personnel in the delivery room, and that in fact, no greater number of hospital personnel are in attendance when the father is present than when he is not;
>
> [6] That there have been no serious incidents attributable to the presence of the father in the delivery room in my experience;
>
> [7] That I have found no evidence in current obstetrical literature indicating that the presence of husbands in the delivery room (assuming proper safeguards are taken) would be hazardous and in fact the most comprehensive study to date on the subject, published by the International Childbirth Education Association in 1968, reported that out of 45,050 husband attended deliveries there were no cases of puerperal infection traceable to the practice.

The cases establishing fundamental familial and procreative rights are pertinent: *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (parents have right that children study German language); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (parents have right to direct education of children); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942) (person has right not to be compulsorily sterilized); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (married persons have right to use contraceptives); *Loving* v. *Virginia*, 388 U.S. 1 (1967) (black and white persons have right to marry each other); *Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (unmarried persons have right to use contraceptives); *Stanley* v. *Illinois*, 405 U.S. 645 (1972) (unmarried father has custodial rights to his child); *Roe* v. *Wade*, 410 U.S. 113 and *Doe* v. *Bolton*, 410 U.S. 179 (1973) (person has right to procure abortion at certain times and under certain circumstances).

Mr. Justice Cardozo believed that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body. . . ." *Schloendorff* v. *Society of New York Hospital*, 211 N.Y. 125, 129, 105 N.E. 92, 93 (1914). Consequently, the informed consent of the patient is necessary before the doctor deals with the patient's body. *Canterbury* v. *Spence*, 464 F.2d 772 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1064 (1972).

In the present case the patients have expressed their desire for a particular form of childbirth which is safe and sanitary for mother and child and imposes a minimum burden on the hospital. The patients' doctors are willing to perform childbirth in the desired way and in fact the patients' claim is conditioned upon the consent of the attending physician, yet the patients' desires as to the manner in which they wish their bodies dealt with has been frustrated by rejection of the method by "the Medical Staff" of the defendant hospital.

This problem is the exact one confronted by Mr. Justice Douglas in his concurring opinion in *Doe* v. *Bolton*, 410 U.S. 179 at 219-20:

> The right of privacy has no more conspicuous place than in the physician-patient relationship unless it be in the priest-penitent relationship.
>
> It is one thing for a patient to agree that her physician may consult with another physician about her case. It is quite a different matter for the State compulsorily to impose on that physician-patient relationship another layer or, as in this case, still a third layer of physicians. The right of privacy—the right to care for one's health and person and to seek out a physician of one's own choice protected by the Fourteenth Amendment—becomes only a matter of theory, not a reality, when a multiple-physician-approval system is mandated by the State.
>
> The State licenses a physician. If he is derelict or faithless, the procedures available to punish him or to deprive him of his license are well known. . . . The good-faith decision of the patient's chosen physician is overridden and the final decision passed on to others in whose selection the patient has no part. This is a total destruction of the right of privacy between physician and patient and the intimacy of relation which that entails.
>
> The right to seek advice on one's health and the right to place reliance on the physician of one's choice are basic to Fourteenth Amendment values. We deal with fundamental rights and liberties, which, . . . can be contained or controlled only by discretely drawn legislation that preserves the "liberty" and regulates only those phases of the problem of compelling legislative concern.
>
> • • •
>
> To protect the woman's right of privacy . . . the control must be through the physician of her choice and the standards set for his performance.

Although it is true that the prohibition of the husband from the delivery room is not a deprivation of the magnitude of the prohibition of an abortion neither is the state's interest in the former of the same magnitude. In

fact, it is so non-compelling as to be virtually non-existent: the hospital fears that the participating husband may catch a glimpse of other women in labor and that it does not have facilities for him to don and doff his hospital gown.

Furthermore, the magnitude of the importance of the presence of the expectant father should not necessarily be downgraded. The moment of delivery is a crucial psychological milestone in the life of the mother. It is probably equally crucial to those fathers who are allowed to be present. In any event, to deny the right of her mate's presence when she desires it at a critical time is unnecessarily, and I believe unconstitutionally, cruel to the expectant mother.

In *United States* v. *Vuitch*, 402 U.S. 62 (1971), Mr. Justice Black said for the Court at 72:

> Certainly this construction [permitting abortions for mental health reasons] accords with the general usage and modern understanding of the word "health," which includes psychological as well as physical well-being. Indeed Webster's Dictionary, in accord with that common usage, properly defines health as the "[s]tate of being . . . sound in body [or] mind." Viewed in this light, the term "health" presents no problem of vagueness. Indeed, whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered.

I would reverse and remand for a trial on the merits.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS

For The Seventh Circuit
Chicago, Illinois 60604

November 21, 1975

BEFORE

Hon. THOMAS E. FAIRCHILD, Chief Judge
LUTHER M. SWYGERT, Circuit Judge*
Hon. WALTER J. CUMMINGS, Circuit Judge
WILBUR F. PELL, JR., Circuit Judge*
Hon. JOHN PAUL STEVENS, Circuit Judge
ROBERT A. SPRECHER, Circuit Judge*
Hon. PHILIP W. TONE, Circuit Judge
WILLIAM J. BAUER, Circuit Judge

EVELYN FITZGERALD, et al., Plaintiffs-Appellees	)	Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.
No. 74-1949 vs.	)	
PORTER MEMORIAL HOSPITAL, et al., Defendants-Appellees.	)	

(74-204 H)

ORDER

On consideration of the suggestion that the above-entitled cause be reheard en banc, a majority of the active members of the Court having voted to deny a rehearing en banc,

IT IS ORDERED that the suggestion that the above-entitled cause be reheard en banc be, and the same is hereby, DENIED.

*Judges Swygert, Pell and Sprecher voted to grant the rehearing en banc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

EVELYN FITZGERALD, ET AL.	)	
V.	)	CIVIL NUMBER H 74-204
PORTER MEMORIAL HOSPITAL, ET AL.	)	

ORDER

Defendants' Motion to Dismiss Complaint and Dismiss Petition for Temporary Restraining Order is GRANTED.

ENTER: September 10, 1974

/s/ Allen Sharp
Judge, U. S. District Court

MEMORANDUM

The court assumes jurisdiction pursuant to 28 U.S.C. §1343(3) and (4).

Plaintiffs seek to enjoin the enforcement of a policy of the Porter Memorial Hospital, a tax supported institution, and to have the policy declared invalid. The policy in question excludes fathers from the delivery room during the birth of their children. No licensed physicians have been joined as plaintiffs in this action. The complaint contains no allegation that any of the licensed physicians with staff privileges at Porter Memorial Hospital would consent to

the presence of a father in the hospital delivery room during childbirth. Plaintiffs allege that this policy is violative of certain of their constitutional rights including the right to privacy and the right to marital privacy as established in Griswold v. Connecticut, 381 U.S. 479 (1965); Roe v. Wade, 410 U.S. 113 (1973); Doe v. Bolton, 410 U.S. 179 (1973). Plaintiffs allege that they do have standing to assert the right to privacy as defined in the cases cited above and in the case of Eisenstadt v. Baird, 405 U.S. 438 (1972).

Plaintiffs claim standing on the basis that there is a confidential relationship and that in such a situation, either party has standing to raise the rights of the other when there are fundamental rights at issue. This is alleged under the holdings in Griswold, supra, and Eisenstadt, supra. However, the Supreme Court of the United States has held that, subject to narrow exceptions, one may not claim standing to vindicate the rights of another. Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 241 (1953).

In the instant case, unlike the factual situation in Roe, supra, Doe, supra, and Hathaway v. Worchester City Hospital, 475 F.2d 701 (1st Cir. 1973), the hospital is not denying the plaintiffs access to the facilities or the opportunity to have a certain, medically approved operation performed; but the hospital has placed a certain restriction on the personnel present during the operation. It is

alleged that such restriction could curtail the effectiveness of a certain type of childbirth method, the LaMaze method of psychoprophylactic childbirth. Since no licensed physicians are included in this suit, and the plaintiffs have not alleged that any physician would consent to the use of the LaMaze method, the plaintiffs are seeking to assert the rights of the physician in regard to the practice of medicine.

The court does not believe that the plaintiffs, in this instance, fall within the exception to the general rule which bars standing to one seeking to vindicate the Constitutional rights of a third party as stated in Barrows, supra. Any doctor, unlike the third party in Barrows, could assert his rights under the Constitution without difficulty. Thus, the lack of a physician as a plaintiff prevents the plaintiffs from asserting the physician's right with respect to the medical practice allowed by the defendant hospital.

Thus, for the reasons given above, the court finds that the particular right sought to be asserted belongs to a physician and a patient cannot assert that right as it affects the medical procedures in a hospital since the hospital is not denying the patient the opportunity of having an operation performed, but only placing certain restrictions upon the procedure. The defendant's motion to dismiss is therefore granted.

Supreme Court, U. S.
FILED
MAR 13 1976
MICHAEL RODAK, JR., CLERK

No. 75-1203

In the

Supreme Court of the United States

OCTOBER TERM, 1975

EVELYN FITZGERALD, BRUCE FITZGERALD, DEBRA GREENER, MICHAEL GREENER, GAIL ATHA, BARBARA STAFFELD, CHARLES STAFFELD, DIANA ARNETT, CHARLES ARNETT, PAULETTE THOMAS, THOMAS THOMAS, HENRY FARAG, DONNA FARAG, SUSAN CHUBBS, BRUCE CHUBBS; and on behalf of all other persons similarly situated,

Petitioners,

vs.

PORTER MEMORIAL HOSPITAL; ARTHUR S. MALASTO, in his capacity as Administrator of Porter Memorial Hospital; and MAURICE MASON, JAMES W. CHESTER, WARREN H. CANRIGHT, and JAMES J. CRANDALL, individually and in their capacities as members of the Board of Trustees of Porter Memorial Hospital,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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J. Morton, M.D., *Fathers in the Delivery Room—an opposition standpoint,* HOSPITAL TOPICS (Jan. 1966) 103 11

S. Olds and L. Witt, *New Ban in the Delivery Room —the Father,* TODAY'S HEALTH (Oct. 1970) 52 12

A. Penfield, M.D., *Laparoscopic Sterilization under Local Anesthesia,* 119(2) AM. JOUR. OF OBSTETRICS AND GYNECOLOGY 733, 734, 735 (1974) 20

M. Ravin, M.D., *Comparison of Spinal and General Anesthesia for Lower Abdominal Surgery in Patients with Chronic Obstructive Pulmonary Disease,* 35 ANESTHESIOLOGY 319 (1971) 20

N. Sehgal, M.D., *The Potential for Problems when Husbands are in the Delivery Room,* RESIDENT AND STAFF PHYSICIAN (March 1973) 33 12

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1203

EVELYN FITZGERALD, BRUCE FITZGERALD, DEBRA GREENER, MICHAEL GREENER, GAIL ATHA, BARBARA STAFFELD, CHARLES STAFFELD, DIANA ARNETT, CHARLES ARNETT, PAULETTE THOMAS, THOMAS THOMAS, HENRY FARAG, DONNA FARAG, SUSAN CHUBBS, BRUCE CHUBBS; and on behalf of all other persons similarly situated,

Petitioners,

vs.

PORTER MEMORIAL HOSPITAL; ARTHUR S. MALASTO, in his capacity as Administrator of Porter Memorial Hospital; and MAURICE MASON, JAMES W. CHESTER, WARREN H. CANRIGHT, and JAMES J. CRANDALL, individually and in their capacities as members of the Board of Trustees of Porter Memorial Hospital,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL PROVISIONS INVOLVED

The Petition for Writ of Certiorari (the "Petition") states under this heading at p. 3 that "the limited question presented for review is essentially one of procedure rather than substance." However, examination of the Petition

reveals that petitioners' contention that the Court of Appeals erred in deciding this case without remanding for an evidentiary hearing depends upon the validity of two substantive propositions, i.e., (1) that this case involves a constitutional question of "grave importance" (Petition, pp. 3, 6, 10, 11, 15, 18); and (2) that the answer to the constitutional question would be made clearer by the production of evidence (Petition, pp. 5, 7, 9, 10, 12, 14, 15, 18). Thus the real questions here presented are not, as petitioners state, essentially procedural rather than substantive. The questions, as we see them, are set forth immediately below.

QUESTIONS PRESENTED FOR REVIEW

The basic questions presented for review are:

1. Does the complaint (R. 1) raise a constitutional issue of grave importance by asserting that a pregnant woman and her husband have a "fundamental" right, within the meaning of the United States Constitution, to insist upon the husband's presence in the delivery room when the woman's baby is delivered?

2. Assuming, *arguendo*, that a constitutional question is presented, would the answer be made clearer by an evidentiary hearing?

STATEMENT OF THE CASE

A. Nature of the case

We accept petitioners' statement of the nature of the case except for its assumption that "rights secured to them by the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution" have been violated by the policy of the respondent Porter Memorial Hospital (the "Hospital").

B. Statement of facts

Petitioners' "Statement of the Facts" fails to disclose that petitioners concede that the "right" which they assert depends upon the consent of the attending physician. (Opinion below, Petition, A-7).

Petitioners also refer to evidence which they are prepared to offer. As we show later in this Brief, the Record in this case (which both petitioners and respondents have requested be transmitted to the clerk of this Court) clearly demonstrates that such evidence would add nothing to the materials which were before the District Court and the Court of Appeals. The Record further shows (summary of proceedings) that on August 20, 1974 petitioners presented evidence in support of their motion for a temporary restraining order.

SUMMARY OF ARGUMENT

In this case the petitioners challenge the constitutionality of a rule of the respondent Hospital which prohibits the presence of non-medical personnel in its delivery rooms. The petitioners urged in the trial court and in the Court of Appeals that a husband and wife, with the consent of the attending physician, have a fundamental constitutional right to have the husband present in the delivery room when the wife's baby is delivered. The trial court, after a hearing, dismissed the complaint on the ground that the petitioners lacked standing. On appeal the respondents conceded petitioners' standing to sue but argued that no fundamental right such as that insisted upon by petitioners exists. The Court of Appeals agreed and decided the case on its merits. Petitioners now contend that the case should have been remanded to the trial court for an evidentiary hearing. Petitioners say

that their Petition for Writ of Certiorari is confined to a narrow procedural issue, i.e., whether the Court of Appeals acted properly in passing upon a constitutional question not decided by the trial court.

Since the prevailing party may ordinarily assert in a reviewing court any ground in support of his judgment, it is the position of the respondents that the Court of Appeals acted with complete propriety. Even though the trial court disposed of the case on the ground that petitioners lacked standing, its decision should stand if dismissal was proper for any reason. Petitioners seek to circumvent this well-accepted rule by urging that a court of review should not ordinarily pass upon matters not presented to, considered or decided by the trial court. Here, however, the alleged constitutional question was, as we demonstrate in Points I and II, 1, *infra*, fully presented to the trial court. Moreover, the "rule" invoked by the petitioners is subject to the salutary exception which allows courts of review to do what ought to be done in the interests of effective judicial administration and judicial economy.

Petitioners also urge that a Court of Appeals should not pass upon a "grave constitutional question" when the answer to the question would be made clearer by an evidentiary hearing. It is here that petitioners' position goes beyond the bounds of raising a purely procedural question, for, in order to prevail on this point, petitioners must show (1) the existence of a grave constitutional question, and (2) that evidence would indeed make the answer clearer. Respondents urge that no grave constitutional question is presented because (1) petitioners seek to elevate a mere privilege, concerning which there is clearly and admittedly sharp disagreement within the

medical profession, to the status of a "fundamental right," (2) there is no decision of this Court which indicates the existence of a grave constitutional question, and (3) serious consequences, which must be considered in creating new fundamental rights, would ensue from a holding that the presence of a husband in the delivery room when his wife's baby is delivered is a right entitled to constitutional protection. Finally, respondents urge that the materials which were before the trial court and the Court of Appeals afford an ample basis for the decision of the Court of Appeals that petitioners do not assert a constitutional right. As a consequence, an evidentiary hearing would serve no useful purpose and would indeed result in the respondent Hospital's incurring needless additional legal expense at a time when the cost of medical care is a matter of serious national concern.

ARGUMENT

I. SINCE THE PREVAILING PARTY MAY ORDINARILY ASSERT IN A REVIEWING COURT ANY GROUND IN SUPPORT OF HIS JUDGMENT, PETITIONERS' POSITION PRESUPPOSES THE EXISTENCE OF A CONSTITUTIONAL QUESTION THE ANSWER TO WHICH WOULD BE MADE CLEARER BY AN EVIDENTIARY HEARING.

In *Dandridge* v. *Williams,* 397 U.S. 471 (1970), the validity of a regulation of the State of Maryland relating to the administration of an aspect of its public welfare program was challenged. A three-judge District Court had concluded that the regulation violated the federal Social Security Act of 1935 as well as the Fourteenth Amendment. Later the District Court revised its opinion and rested its determination that the regulation was invalid entirely on the constitutional ground. This Court found the regulation valid, but felt bound to consider both the statutory and constitutional issues, pointing out that, "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, *whether or not that ground was relied upon or even considered by the trial court.*" (*Id.* at 475, note 6. Emphasis supplied). This statement is in full accord with the rule that in the review of judicial proceedings, if the decision below is correct, it must be affirmed even though the lower court relied upon a wrong ground or gave a wrong reason. *Helvering* v. *Gowran,* 302 U.S. 238, 245 (1937); *J. E. Riley Investment Co.* v. *Commissioner,* 311 U.S. 55, 59 (1940).

Petitioners seek to avert the impact of cases such as those cited in the preceding paragraph by reliance upon

others which take the position that an appellate court will not ordinarily consider a question of law or fact which was not *presented to,* considered, or decided by the trial court. Those cases have no bearing here not only because effective judicial administration and judicial economy frequently require an exception to the "rule" which they lay down, but also because the alleged constitutional issue which petitioners say should not have been decided by the Court of Appeals was fully presented and argued in the trial court.

That the question of petitioners' "right" to have the husband petitioners present in the delivery room when their children were born was fully presented to the trial court is amply demonstrated by the following documents which are a part of the record in the trial court: (1) Brief of Amicus Curiae, Paul R. Baier, Pro Se, Expressing the Views of the International Childbirth Education Association, as submitted in *Hulit* v. *St. Vincent's Hospital,* Supreme Court of the State of Montana, No. 12414 [520 P.2d 99 (Mont. 1974)], pp. 75-87 (R. 10); (2) Defendants' Brief in Opposition to Issuance of Temporary Restraining Order—Constitutional Issues, pp. 3-6 (R. 13); (3) Supplemental Brief in Support of Plaintiffs' Motion for Temporary Restraining Order, pp. 8-11 (R. 19); (4) Plaintiffs' Supplemental Brief in Support of Motion for Temporary Restraining Order, pp. 1-4 (R. 21). And in their Brief in Support of Plaintiffs' Motion for Temporary Restraining Order, p. 1 (R. 18), petitioners advised the trial court that *"The sole issue* before the court is whether the defendants' rule excluding all fathers from the hospital delivery room . . . is a constitutionally permissible restriction on plaintiffs' *fundamental privacy rights* . . ." (Emphasis supplied).

Even if it were not abundantly clear from the foregoing references that the alleged constitutional issue was presented to the trial court, many of the cases relied upon by the petitioners are not pertinent here. They merely reiterate the well-settled principle that a reviewing court should not ordinarily consider issues not raised below. That principle, however, is subject to the equally well-settled exception, which is recognized by petitioners (Petition, pp. 14-15), that effective judicial administration and judicial economy dictate that the merits of a controversy be addressed at the earliest possible time. *See Turner* v. *City of Memphis,* 369 U.S. 350, 353 (1962); *Levin* v. *Mississippi River Corp.,* 386 U.S. 162, 170 (1967). This view is also supported by *Hormel* v. *Helvering,* 312 U.S. 552, 557, 558 (1941), upon which petitioners place considerable reliance. (Petition, pp. 6-7). Petitioners also rely heavily on what they perceive to be a conflict between circuits generated by *Wulff* v. *Singleton,* 508 F.2d 1211 (8th Cir. 1975), *cert.* granted, 95 S.Ct. 2655 (1975) and *Roe* v. *Ferguson,* 515 F.2d 279 (6th Cir. 1975). Those cases, however, do not involve the propriety of a decision by a Court of Appeals concerning a constitutional question with respect to which no evidentiary hearing has been held. The *Wulff* case deals with the *jurisdiction* of a Court of Appeals to pass upon the constitutionality of a statute *on an appeal from a three judge court* convened pursuant to 28 U.S.C. §§2281 and 2284. (Petition for Certiorari in the *Wulff* case, pp. 10-14). The *Ferguson* case deals with the *jurisdiction* of the Court of Appeals to decide a constitutional question, not decided below, which the court felt was required by statute to be passed upon by a three-judge district court. No such jurisdictional problem exists in this case and, for this reason, whatever conflict may exist between the *Wulff* and *Ferguson* cases should not be allowed to obfuscate the issue here.

In view of the foregoing, petitioners are left with the argument that such cases as *Hammond* v. *Schappi Bus Line, Inc.,* 275 U.S. 164 (1927) and *Borden's Farm Products Co., Inc.,* v. *Baldwin,* 293 U.S. 194 (1934), support their contention that an evidentiary hearing is needed here. In both of those cases, however, this Court found that constitutional questions "both of novel and of far reaching importance" were presented. (275 U.S. at 171; 293 U.S. at 212). Moreover, in the *Schappi* case, this Court outlined a host of questions (275 U.S. at 170-71) which it felt could not be answered without factual enlightenment. And in the *Borden* case this Court was concerned with the constitutionality of a New York statute authorizing a control board to establish a differential of one cent per quart of milk in favor of dealers not having a "well advertised trade name." Obviously the validity of the apparently discriminatory provisions of the statute would depend upon the presentation of complex economic and market data which would require an evidentiary hearing.

From the *Schappi* and *Borden* cases the conclusion may be drawn, as the matter is put in the concurring opinion of Justices Stone and Cardozo in the *Borden* case, that "it is inexpedient to determine grave constitutional questions upon a demurrer . . . or upon an equivalent motion, if there is a reasonable likelihood that the producton of evidence will make the answer to the question clearer." (293 U.S. at 213). As we believe we have demonstrated, that statement constitutes the legal essence of petitioners' argument. The argument, however, must obviously fail unless (1) a grave constitutional question is present here and (2) the answer to that question will be made clearer by the production of evidence. For reasons which we shall now discuss, it is clear that petitioners have met neither test.

II. NO GRAVE CONSTITUTIONAL ISSUE IS PRESENTED SINCE PETITIONERS SEEK TO CONVERT A PRIVILEGE INTO A RIGHT.

1. Differences of opinion within the medical profession concerning the Lamaze psychoprophylactic method of childbirth indicate that petitioners seek to convert a privilege into a constitutional right.

Petitioners state that they "are prepared to offer evidence to prove . . . that the presence of husbands in the hospital delivery room is a well-accepted medical practice." (Petition, p. 5). Petitioners also offer to produce evidence to prove "that the psycho-prophylactic (or prepared) childbirth methods with the lack of or lesser amounts of anaesthesia are safe and desirable for both mother and baby." (*Id.*) We do not question that petitioners could produce testimony in support of both of these points. That does not mean, however, that permitting fathers to be present in the delivery room is, in the general opinion of the medical profession, a desirable practice from a medical point of view. In the first place, petitioners concede that the attending physician's consent is an absolute prerequisite to allowing the husband to be present at the birth of his child. (Opinion below, Petition A-7). Secondly, and perhaps more importantly, there is serious disagreement within the medical profession concerning the practice which the petitioners espouse. This is demonstrated not only by materials relied upon by the petitioners in the trial court but also by other discussions of the subject.

In the publication, *Husbands in the Delivery Room: Recommendations to Hospital Administrators and Physicians on the Desirability and Safety of the Practice*, attached the trial court Brief in Support of Plaintiffs' Motion for Temporary Restraining Order (R. 18), it is

stated at p. iii that "the first step toward . . . allowing women to share the experience of birth with their husbands *has yet to be taken in many hospitals throughout the country.*" (Emphasis supplied). The same publication refers at p. iv to husband participation in childbirth as "*(o)ne of the most controversial aspects* of Family Centered Maternity Care" (emphasis supplied), and states at p. 12 that of 407 responses to an American College of Obstetrics and Gynecology survey in California, 275 members stated that they would not like to admit the patient's husband to the delivery room. And in the other article cited by petitioners (J. Miller, M.D., *Fathers in the Delivery Room*), the author, though favoring petitioners' view, states that Dr. Allan Barnes (then editor of the American Journal of Obstetrics and Gynecology), in opposing a husband's presence in the delivery room, "*speaks for the great majority* of doctors and hospital administrators." (Emphasis supplied).

Other articles, not referred to by the petitioners, fortify the conclusion that petitioners seek judicial elevation, to the status of a constitutional right, of a privilege still the subject of widely divergent views within the medical profession. Thus, an Associate Clinical Professor of Obstetrics and Gynecology at Loma Linda (California) University has stated that, "We feel that for the best interests of the patient . . . visitors to the delivery room [should] be barred by formal statement in the by-laws of the hospital and its staff." J. Morton, M.D., *Fathers in the Delivery Room—an opposition standpoint,* HOSPITAL TOPICS (Jan. 1966) 103, 104. Divergent views are also described in an article of which the subtitle is "The debate grows—on the one side fathers and physicians who declare Dad's rightful place is in the delivery room. On the other side, fathers and physicians who say childbirth is not for sharing."

S. Olds and L. Witt, *New Man in the Delivery Room—the Father,* TODAY'S HEALTH (Oct. 1970) 52. The same article quotes Robert Morris, M.D., Associate Director of Obstetrics, New York University Hospital, as saying that, "At an important time like this [birth], the medical personnel should be distracted as little as possible from their essential tasks." (*Id.* at 54). And the Assistant Director, Department of Obstetrics and Gynecology, Sacramento Medical Center, California, who approves of the pregnant woman's husband's or mother's presence in the labor room, but strongly objects to carrying this into the delivery room, concludes that, "it should be remembered that the quality of obstetrical care depends on the professional ability of the obstetrician, and not whether the husband is or is not allowed to stay in the delivery room and watch the whole procedure." N. Sehgal, M.D., *The Potential for Problems when Husbands are in the Delivery Room,* RESIDENT AND STAFF PHYSICIAN (March 1973) 33, 35.

The foregoing articles are quoted, not with a view to establishing the undesirability of permitting husbands to be with their wives in hospital delivery rooms, but to show that the petitioners are asking for judicial declaration of the existence of a *fundamental constitutional right* in an area which clearly falls within the expertise of the medical profession and with respect to which physicians' opinions vary widely. In view of this divergence of medical opinion concerning the father-coach method of delivery, we suggest that the petitioners are not seeking to vindicate what has been referred to as a "constitutional interest of first magnitude."* What they are really seeking

* *See Miller* v. *School District Number 167,* 495 F. 2d 658, 668 (7th Cir. 1974) (school board's termination of employment of teacher who wore beard and sideburns *held* not a deprivation forbidden by the constitution).

is judicial protection of a privilege. *See* C. Shu, M.B., Ch. B, *Husband-Father in Delivery Room? (Obstetricians hold divergent views about permitting a husband-father to witness the birth of his child),* HOSPITALS, J.A.H.A. (Sept. 17, 1973) 90, 94: "It must be clearly understood that the presence of the husband-father in the delivery room *is a privilege to be granted and not a right to be demanded.*" (Emphasis supplied).

2. There is no decision of this Court concerning privacy or liberty which indicates that this case involves a grave constitutional question. Indeed, this Court's decision in Roe v. Wade supports the opposite view.

In *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 65 (1973), which held that a Georgia statute prohibiting the distribution of obscene materials was constitutional, this Court said:

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.'" *Palko* v. *Connecticut,* 302 U.S. 319, 325 (1937). *Roe* v. *Wade,* 410 U.S. 113, 152 (1973). This privacy right encompasses and protects the personal intimacies of the home, the family, marriage, motherhood, procreation, and child rearing.

The decisions of this Court which may be regarded as supporting in a general way the statement contained in the second sentence of the above quotation are cited and briefly described in the footnote.* Since the "right" to

* *Meyer* v. *Nebraska,* 262 U. S. 390 (1923) (statute prohibiting teaching of any modern language to any child who had not passed eighth grade *held* contrary to the concept of liberty which denotes the right of an individual "to marry, establish a home and bring up children

insist on the presence of a husband in the delivery room has never been before this Court, it is obvious that none of the cases cited in the footnote is directly in point. Some are not only not directly in point but also have only a remote bearing on the petitioners' claim in this case and therefore do not require comment. We shall, however, briefly discuss the four cases which appear to have a some-

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• (Continued)

. . ." *Id.* at 399); *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925) (statute requiring children between eight and sixteen to attend public schools "unreasonably interferes with the liberty of parents . . . to direct the upbringing and education of children . . ." *Id.* at 534-35); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942) (compulsory sterilization statute *held* void. "Marriage and procreation are fundamental to the very existence and survival of the race." *Id.* at 541); *Griswold* v. *Connecticut,* 381 U. S. 479 (1965) (statute forbidding use of contraceptives *held* invalid); *Loving* v. *Virginia,* 388 U. S. 1 (1967) (statute prohibiting marriages between white and black people *held* invalid. *Skinner* v. *Oklahoma* quoted with approval); *Stanley* v. *Georgia,* 394 U. S. 557 (1969) (state may not prohibit possession of obscene materials, because under the First Amendment, "the State has no business telling a man sitting alone in his own house, what books he may read, or what films he may watch." *Id.* at 565); *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972) (ban on sale of contraceptives to unmarried individuals impinges on the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as to the decision whether to bear or beget a child." *Id.* at 453); *Stanley* v. *Illinois,* 405 U. S. 645 (1972) (unwed father *held* entitled to hearing on fitness as a parent before being deprived of his children, quoting *Skinner* v. *Oklahoma*); *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe et al.* v. *Bolton,* 410 U. S. 179 (1973) (right to abortion during first trimester of pregnancy); *Cleveland Board of Education* v. *LaFleur,* 414 U. S. 632 (1974) (school board rule requiring pregnant teacher to take unpaid maternity leave at specified time before birth of child *held* an intrusion upon teachers' decisions whether to bear or beget children. *Id.* at 650).

what closer relationship to this case. Even these fall far short of supporting petitioners' position and we believe that *Roe* v. *Wade,* 410 U.S. 113 (1973), strongly supports ours.

Griswold v. *Connecticut,* 381 U.S. 479 (1965), clearly recognizes the right of privacy inherent in the marriage relationship and may be said to place on a constitutional plane the sanctity of the home, attempts to regulate marital intimacies and intrusions on the determination of whether or not to have children. None of those elements is present here.

Eisenstadt v. *Baird,* 405 U.S. 438 (1972), likewise places within the protection of the right of privacy "the right of the *individual,* married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to *bear or beget* a child." (*Id.* at 453. Emphasis partially supplied). That is not involved here.

The individual's right of decision as to bearing and begetting children was enlarged in *Roe* v. *Wade,* 410 U.S. 113 (1973) and *Doe et al.* v. *Bolton,* 410 U.S. 179 (1973). In those cases, this Court recognized that a pregnant woman, at least with the concurrence of her physician, has a constitutional right, which cannot be restricted by state law, to decide to terminate her pregnancy during the first trimester. In reaching this conclusion, this Court, in *Roe* v. *Wade,* 410 U.S. 113, 153 (1973), placed considerable stress on the "detriment that the State would impose upon the pregnant woman by denying this choice altogether . . .," *i.e.,* direct harm medically diagnosable, a distressful life and future for the woman, psychological harm, the tax that child care may impose on mental and physical health, the distress for all concerned associated with an

unwanted child, the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it, and in some cases the stigma of unwed motherhood. Those reasons cannot be advanced in support of petitioners' demand for recognition of the presence of fathers in the delivery room as a constitutional right. That choice involves only a method of birth and not the effects of birth itself.

We believe that the foregoing discussion substantiates our earlier assertion that the cases fall far short of establishing the right claimed by the plaintiffs. Our position that no such right exists in fact finds strong affirmative support in *Roe* v. *Wade*. For this Court there held that a woman's right to decide whether or not to bear a child is not unrestricted after the first trimester of pregnancy. And after viability is established, the state and its public hospitals plainly have a legitimate interest in attempting to assure the health and safety of both mother and baby in the process of childbirth. If, when the point of viability is reached, mother and child are of appropriate concern to the states in an abortion case, then surely their health and safety are matters of even more compelling interest at the moment of birth.

3. Since the petitioners seek to convert a privilege into a constitutional right, i.e., to create a new constitutional right, the consequences of the step which, realistically speaking, the petitioners are asking this Court to take must be carefully weighed.

We believe that we have shown in Points II, 1 and 2, *supra*, that the petitioners are trying to convert a privilege into a right and that there is no decision of this Court which justifies petitioners' position here. In other words, the petitioners are asking this Court to declare the exist-

ence of a new fundamental constitutional right—a step which should be carefully weighed in terms of the existing rubric of the law and also in terms of possible consequences. As was wisely stated by Mr. Justice Harlan, dissenting in *Poe* v. *Ullman*, 367 U. S. 497, 544-45 (1961):

> Each new claim to Constitutional protection must be considered against a background of Constitutional purposes, as they have been rationally perceived and historically developed. Though we exercise limited and sharply restrained judgment, yet there is no "mechanical yardstick," no "mechanical answer." *The decision of an apparently novel claim must depend on grounds which follow closely on well-accepted principles and criteria. The new decision must take "its place in relation to what went before and further* [*cut*] *a channel for what is to come." Irvine* v. *California*, 347 U. S. 128, 147 (dissenting opinion). The matter was well put in *Rochin* v. *California*, 342 U. S. 165, 170-171:
>
> > "The vague contours of the Due Process Clause do not leave judges at large. We may not draw on our merely personal and private notions and disregard the limits that bind judges in their judicial function. Even though the concept of due process of law is not final and fixed, these limits are derived from considerations that are fused in the whole nature of our judicial process . . . These are considerations deeply rooted in reason and in the compelling traditions of the legal profession." (Emphasis supplied).

Later, discussing the same problem in *Griswold* v. *Connecticut*, 381 U. S. 479 (1965), Mr. Justice Goldberg, in a concurring opinion, put the matter thus (*id.* at 493):

> In determining which rights are fundamental, judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look

> to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there] as to be ranked as fundamental." . . . The inquiry is whether a right involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'. . . ."

In this case, we deal with a "new claim to Constitutional protection," and this Court, despite petitioners' assertion that only a procedural question is before it, is asked to make a new decision which must take its place in relation to the past and take account of its future consequences. The result must not be allowed to depend on "personal and private notions." Yet, considering the divergence of opinion within the medical profession as to the merits of the psychoprophylactic method of childbirth (*see* Point II, i, *supra*), that would be the consequence of recognition of the petitioners' claim. For, realistically speaking, the petitioners seek an assessment by this Court of problems falling without the spheres of the special competence of the judiciary. *See Miller* v. *School District Number 167*, 495 F.2d 658, 668, note 35 (7th Cir. 1974). In that respect this case is vastly different from those involving contraception and abortion, because the effects of those processes are clear and distinct as contrasted with the speculative advantages said by some to flow from a father's presence at the birth of his child. True, the difference is one of degree, but it is so substantial that in cases of this kind, as in those involving modes of dress,* results are bound to

* *See* the very large number of cases involving hair style collected in *King* v. *Saddleback Junior District*, 445 F.2d 932, 936 (9th Cir. 1971), *cert. denied*, 404 U. S. 979 (1971), and in Note, 84 Harv. L.Rev. 1702, 1703, note 4 (1971).

depend far too heavily on "personal and private notions." A sounder basis for judgment is needed.

Beyond the need for a more solid foundation for judgment is the need that any new right cut a rational "channel for what is to come." Of course every consequence of a new right cannot be anticipated,** but surely the problems which hospitals all over the country may encounter if the petitioners prevail here are legitimate considerations of this Court. One result is almost certain. If husbands are to be allowed in the delivery room, the decisions in *Glona* v. *American Guarantee & Liability Insurance*, 391 U. S. 73, 75-76 (1968), *Eisenstadt* v. *Baird*, 405 U. S. 438, 453 (1972) and *Stanley* v. *Illinois*, 405 U. S. 645, 652 (1972) will offer an intriguing basis for the assertion of a similar right by unwed fathers. Of more serious import is the strong likelihood that judicial intervention here will encourage other attempts to impinge, in similar and other ways, upon the autonomy of hospitals in connection with other medical procedures.* Hospitals, of course, do not

* In this connection, *see* the comments of Mr. Justice Brennan, dissenting in *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 82-83 (1973), where he describes the results of the Court's earlier decision in *Roth* v. *United States*, 354 U. S. 476 (1957).

** This problem is recognized in the opinion of the Court of Appeals: "Indeed, any patient about to undergo serious surgery might also assert a constitutionally protected interest in the companionship of his choice during the time of stress, or, indeed, in the surgical procedure of his choice." (Petition, A-6, note 16). That the problem is not imagined is attested by the fact that in numerous surgical procedures the patient is awake throughout. I. Cooper, M.D., Involuntary Movement Disorders 363-64, 368 (1969) (brain surgery); R. Dripps, M.D. and J. Eckenhoff, M.D., Introduction to Anesthesia 238, 241 (4th ed. 1972); T. Kallos, M.D. and T. Smith, M.D., *Continuous Spinal Anes-*

have a fundamental "right to be let alone" under any and all circumstances. We suggest, however, that the technical aspects of a hospital's operations should be immune from judicial interference except in rare instances, *e. g.*, when a clear violation of a fundamental right has been established or when patient care has suffered or is threatened by some act or omission of the hospital. That has not happened here.

III. AN EVIDENTIARY HEARING WOULD SERVE NO USEFUL PURPOSE.

Petitioners assert that "there exists a genuine dispute as to the underlying facts which must first be settled by the trial court. . . ." (Petition, p. 12). They also suggest (1) that "the introduction of evidence would be helpful to clarify the issues . . ." (*id.*, p. 14), (2) that a "resolution of the dispute as to the underlying facts" by the trial court is essential to the proper determination of the grave constitutional issue which they say exists (*id.*, p. 15), and (3) that "there exists a genuine dispute as to the material facts." (*Id.*, p. 18). Nowhere in the Petition, however, is the nature of the alleged factual dispute disclosed. For even if all of the evidence which petitioners say they

•• (Continued)
thesia with Hypobaric Tetracaine for Hip Surgery in Lateral Decubitus, 51 ANESTHESIA AND ANALGESIA 766 (1972); G. Leaverton, M.D. and W. Garnjobst, M.D., *Comparison of Morbidity after Spinal and Local Anesthesia in Inguinal Hernia Repair,* 38 AMERICAN SURGEON 591 (1972); A. Penfield, M.D., *Laparoscopic Sterilization under Local Anesthesia,* 119(2) AM. JOUR. OF OBSTETRICS AND GYNECOLOGY 733, 734, 735 (1974); M. Ravin, M.D., *Comparison of Spinal and General Anesthesia for Lower Abdominal Surgery in Patients with Chronic Obstructive Pulmonary Disease,* 35 ANESTHESIOLOGY 319 (1971).

would introduce (Petition, pp. 5, 11) were received, the fact remains that there exists a bona fide difference of opinion among physicians concerning the presence of fathers in the delivery room.

That there are within the medical profession divergent views concerning the Lamaze psychoprophylactic method of childbirth is not surprising because it is a method of recent vintage.• The Court of Appeals clearly recognized the existence of divergent medical opinions as did petitioners in that Court. The evidence which petitioners say should be presented, considered in the light of literature cited not only by us but also by the petitioners themselves (*see* Point II, 1, *supra*), clearly suggests that an evidentiary hearing would involve a parade of experts for both parties who would express divergent opinions. To decide without such a hearing, as the Court of Appeals did, that the presence of fathers in the delivery room does not involve a fundamental constitutional right is not to bow "to the expertise of the medical profession without the benefit of an evidentiary hearing." Rather, it is to recognize, as the opinion below does (Petition, A-7, A-8, note 22), that there is a strong disagreement among physicians concerning a privilege which falls without the spheres of the special competence of the judiciary. Although the time may come when competent physicians no longer disagree, it is respectfully suggested that, unless and until it does, hospital governing bodies should be left free to follow the recommendations of their own medical staffs concern-

• The Lamaze method was first observed in Russia in 1951 by Dr. Fernand Lamaze, who introduced it in France and elsewhere. It seems first to have been noticed in this country in 1959. E. BING, SIX PRACTICAL LESSONS FOR AN EASIER CHILDBIRTH 74-75 (1967).

ing the propriety of allowing non-medical personnel in the delivery room.* That is what the respondent Hospital did here.**

CONCLUSION

We believe that we have established that the Petition should be denied in the absence of a showing by petitioners that they have presented a grave constitutional question which can be better answered following an evidentiary hearing. Petitioners have not demonstrated even the potential existence of a fundamental constitutional right. Rather have they sought to elevate a privilege to the dignity of a new and heretofore unknown right with respect to a medical procedure concerning the merits of which a substantial divergence of opinion exists within the medical profession. In so doing, petitioners take no account of the new demands relating to other medical procedures which judicial recognition of a father's presence in the delivery room as a "right" could engender. Nor do petitioners take account of the financial outlays to which such recognition would put public hospitals throughout the

* As to the limited scope of judicial review of hospital actions which other courts have deemed appropriate, *see Williams* v. *Robinson*, 432 F.2d 637, 641 (D.C. Cir. 1970); *Sosa* v. *Board of Managers of Val Verde Memorial Hospital*, 437 F.2d 173, 177 (5th Cir. 1971); *Woodbury* v. *McKinnon*, 447 F.2d 839, 842-43 (5th Cir. 1971); *Ploof* v. *Brooks*, 342 F.Supp. 999, 1004 (D. Vt. 1972); *Duffield* v. *Memorial Hospital Ass'n. of Charleston*, 361 F.Supp. 398, 404 (S.D. W.Va. 1973).

** *See* the affidavit of the respondent Malasto, Administrator of the Hospital referred to in the opinion below (Petition, A-3, note 6, A-7, note 21) which sets forth some of the reasons for the Hospital's rule.

country at a time when the cost of medical care is a matter of the most serious public concern.

Apart from what has been said, even if a constitutional question existed, the materials which were before the trial court, the Court of Appeals and this Court plainly demonstrate that nothing would be gained by remanding this case to the trial court. From those materials, and even without reference to them, it is obvious that this case cannot be equated with the denial of a woman's limited right to an abortion or to her right to access to means of contraception. As the trial court aptly observed, "the hospital is not denying the patient the opportunity of having an operation, but only placing certain restrictions upon the procedure." (Petition, A-17).

On the basis of the foregoing it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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